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In The Supreme Court Of The United States

OCTOBER TERM 1996

ROBERT F. KIRCHGESSNER, JR.; MICHAEL KRANYAK; ANDY KAFEL; JACK TOMASELLI; CHARLES BENE; MAUREEN COOL; BILL SHEERAN; PROBATION OFFICERS/FOP MEMBERS ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED; THE PROBATION ASSOCIATION OF NEW JERSEY,

Petitioners,

v.

ROBERT N. WILENTZ; ROBERT L. CLIFFORD; ALAN B. HANDLER; STEWART G. POLLOCK; DANIEL J. O'HERN; MARIE L. GARIBALDI; GARY S. STEIN, IN THEIR OFFICIAL CAPACITIES AS JUSTICES OF THE SUPREME COURT OF NEW JERSEY,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the petitioners establish a violation of First Amendment associational and free speech rights?

LIST OF PARTIES

Parties to this petition are the petitioners Robert A. Kirchgessner, Jr., Michael Kranyak, Andy Kafel, Jack Tomaselli, Charles Bene, Maureen Cool, Bill Sheeran, Probation Officers/Fraternal Order of Police ("FOP") members on behalf of themselves and all others similarly situated, and the Probation Association of New Jersey. The respondents are Robert N. Wilentz, Robert L. Clifford, Alan B. Handler, Stewart G. Pollock, Daniel J. O'Hearn, Marie L. Garibaldi, Gary S. Stein, in their official capacities as justices of the Supreme Court of New Jersey.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part, that:

> Congress shall make no law ... abridging the freedom of speech ...

The Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No States shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; not shall any States deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1996

ROBERT A. KIRCHGESSER, JR.; MICHAEL KRANYAK; ANDY KAFEL; JACK TOMASELLI; CHARLES BENE; MAUREEN COOL; BILL SHEERAN; PROBATION OFFICERS/FOP MEMBERS ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED; THE PROBATION ASSOCIATION OF NEW JERSEY,

Petitioners,

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ROBERT N. WILENTZ; ROBERT L. CLIFFORD; ALAN B. HANDLER; STEWART G. POLLOCK, DANIEL J. O'HEARN; MARIE L. GARIBALDI; GARY S. STEIN; IN THEIR OFFICIAL CAPACITIES AS JUSTICES OF THE SUPREME COURT OF NEW JERSEY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioners, Robert A. Kirchgessner, Jr., et al., respectfully pray that a writ of certiorari issue to review the

Orders of the United States Court of Appeals for the Third Circuit dated July 19, 1996 and August 21, 1996 (and the Order of the District Court dated April 28, 1995).

OPINIONS AND ORDERS BELOW

The opinion of the New Jersey Supreme Court dated July 8, 1994, is annexed to the appendix as 44A.

The opinion of the District Court of New Jersey dated April 28, 1995, is annexed as 3A.

The order of the District Court of New Jersey dated April 28, 1995, is annexed as 41A.

The judgment order of the United States Court of Appeals for the Third Circuit dated July 19, 1996 is annexed as 1A.

The order of the United States Court of Appeals for the Third Circuit denying rehearing and rehearing in banc dated August 21, 1996, is annexed as 42A.

JURISDICTION

On July 19, 1996, the United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court of New Jersey. On August 21, 1996, the Court of Appeals denied the petition for rehearing and rehearing in banc. The jurisdiction of this Court to review the judgment of the United States Court of Appeals for the Third Circuit is invoked under 28 U.S.C. sec. 1254(1).

STATEMENT OF THE CASE

In October and November of 1993, the Probation Association of New Jersey ("PANJ"), passed a referendum to affiliate itself with the Policeman Benevolent Association of New Jersey (the "State PBA"). In September of 1994, the States PBA agreed to become affiliated with the PANJ, if such affiliation was not prohibited by law. Additionally, many of the petitioners were, at that time, members of the Fraternal Order of Police (the "FOP"), including Kirchgessner.

On March 3, 1994, in response to a request by the Chief Probation Officers' Association, the New Jersey Supreme Court announced that it would review its longstanding policy prohibiting probation officer membership in law enforcement organizations, namely the State PBA and the FOP. The New Jersey Supreme Court appointed retired Superior Court Judge Paul R. Huot, as a special master (the "Special Master"), to develop a factual record to aid in its review of the matter. Judge Huot was designated to create a factual record and recommend findings concerning the issue of whether probation officers could continue as members, or otherwise join, associate and affiliate, with the FOP. The questions framed by the Supreme Court for which it desired a factual record and recommended findings of fact are:

> 1) What impact, if any, will membership of probation officers in the FOP or the State PBA have on the probation function?
>
> 2) Will the affiliation of PANJ with the State PBA result in membership in the PBA of probation officers who are members of PANJ?

3) What is the present number of probation officers who are members of the FOP and what have their activities been in connection with that organization?

4) To what extent, if any, may probation officers become involved in or be seen as supporting political activity as a result of membership in either FOP or State PBA?

5) Does the Legislation (N.J.S.A. 34:13A-5.5) prohibiting, subject to certain exceptions, police officers from joining an employee organization that admits non police to membership imply any legislative policy related to the potential impact on non-police members of such an organization? (74A-75A*).

Preliminarily, Special Master Huot found that there are between 700 and 800 New Jersey Probation Officers who are presently members of the FOP and have been for twenty years. (91A). As to Question Number 1, Special Master Huot found that:

> The testimony and evidence submitted with respect to the impact of membership in a police organization upon the probation function was not such that a true factual determination can be made. The testimony was opinion and speculation. (76A).

As to Question Number 2, Special Master Huot concluded:

> This Special Master does not see any consequences, for good or ill, upon the current PBA members. Since public employees are not permitted to strike, there is no benefit to either group in its collective bargaining.
>
> The consequences of affiliation to the organization of the probation officers association is similar to the consequences to each individual member as set forth in the discussion of the Constitution and By-Laws of the State PBA. It will lose its present autonomy as an organization. (86A).

As to Question Number 3, Special Master Huot concluded:

> ... The recommended finding of fact, therefore, is that the Fraternal Order of Police in New Jersey is a social and fraternal association and that the activities of its members are social, non political and nonlabor oriented. However, lodges in other states have represented probation officers in collective bargaining. (88A).

As to Question Number 4, Special Master Huot concluded:

> The Fraternal Order of Police is not

engaged in partisan political activity.

> The Policeman's Benevolent Association is, from time to time, engaged in partisan political activity. It may support or oppose candidates for elective office and support or oppose legislation ... It is recognized that its activity, although in support of or opposition to a candidate for elective office, is not determined by the political party to which that candidate belongs. (88A).

As to Question Number 5, Special Master Huot concluded:

> It was not the duty of this Special Master to interpret or apply the statute to either police officers or probation officers. There is no determination by this Special Master that the statute will or will not apply to police locals or probation officer locals of the PBA. The applicability of the statute with respect to the police is the initial function of PERC. The commission will conduct its own investigation into the duties and powers of the members and will make its own determination of whether persons are classified as police or non police. The chairman stated that all cases of this kind are fact sensitive. Generally, the power of arrest, the right/duty to carry a gun, to detect crime, apprehend criminals will be evidence of police activity, however, he could not apply the criteria in the abstract. (89A)

Special Master Huot concluded that:

> Membership in the Fraternal Order of Police or the Policeman's Benevolent Association will not impact the function of probation if the probation officer is an ethical professional with integrity. (90A).

The report of the Special Master was submitted to the Court on April 28, 1994. On July 8, 1994, the New Jersey State Supreme Court (the "respondents: in their official capacity) issued what it characterized as an "administrative ruling." (44A). In the Supreme Court's per curiam decision, the respondents barred petitioners from joining, associating or affiliating with the FOP. (71A-72A). In so doing, the respondents failed to adopt nearly every factual finding offered by the Special Master (who had been appointed by respondents) after five days hearings.

The Court justified its disagreement with the Special Master because the factual evidence was insufficient given the time constraints of the hearing. (45A). The Court differed in its agenda for and assessment of the role of

probation officers. (45A-46A). The Court's unequivocal "statement of basic probation policies" motivating its decision include 1) probation officers must enforce court orders which must be respected and obeyed, notwithstanding lack of resources; 2) cooperation between probation and police is essential, exists today, and is "strongly encouraged" by the Court; 3) probation has become increasingly dangerous, and the safety of officers should be ensured; 4) the punitive function probation cannot be compromised; and 5) probation needs a greater emphasis on rehabilitation. (47A-48A). The primary basis for the Court's ruling was that there is a "fundamental difference" between probation and police organizations. (46A). Probation is viewed as an "integral" arm of the judiciary, and subject to judicial integrity and impartiality – "totally and scrupulously so." (46A). To the contrary, police are viewed as "law enforcement" standing "firmly and properly" on the side of the prosecution. (46A). The enforcement of judicial orders, evidently, is not law

enforcement. The Court concludes that police and probation "are not only different, but incompatible;" that "separation of the two is essential to the impartiality of the probation function and to the integrity of the judiciary." (46A) and that integration of the two "would do damage even as it affects probation today" (59A), because they have "adversarial positions" in the Criminal Division. (60A). Consistent with the July 8, 1994 opinion, the AOC issued a directive dated December 7, 1994, which ordered that probation officers who are current members of the FOP may not renew their existing memberships, which "... in any event must be terminated by resignation or otherwise by January 1, 1995."

On December 15, 1994, petitioners Kirchgessner et al. filed a Verified Class Action Complaint and Jury Demand against the justices of the Supreme Court of the State of New Jersey alleging, inter alia, in Count I, a violation of the First Amendment's guarantee of freedom to associate.

On December 15, 194, petitioners moved for a

preliminary injunction in the District Court. In addition to petitioners' suit, the PANJ also filed suit seeking a preliminary injunction, as well, and the matters were consolidated. Respondents (the Chief Justice and the Associate Justices) filed a cross-motion to dismiss for failure to state a claim.

On January 17, 1995, Judge Lechner heard the motion, and on April 28, 1995, he issued an Order which granted the respondents' motion to dismiss the petitioners' causes of action based upon federal law; ordered that supplemental jurisdiction not be exercised as to respondents' causes of action based upon state law; ordered that the cause of action based upon Federal Law alleged by the petitioners be dismissed without prejudice; ordered that the preliminary injunction motion made by petitioners be denied as moot; and ordered that the petitioners' demand for class certification be denied as moot. (41A).

A Notice of Appeal was filed on May 10, 1995.

On July 19, 1996, the United States Court of Appeals for the Third Circuit entered a Judgment Order affirming the judgment of the district court. (1A-2A). On August 21, 1996, the Third Circuit denied the petition for rehearing and rehearing in banc. (42A-43A).

REASONS FOR GRANTING THE WRIT

POINT I

THE PETITION FOR CERTIORARI SHOULD BE GRANTED SINCE THE PETITIONERS HAVE ESTABLISHED A VIOLATION OF FIRST AMENDMENT ASSOCIATIONAL AND FREE SPEECH RIGHTS; THE STRICT SCRUTINY TEST SHOULD BE APPLIED; AND EVEN UNDER THE PICKERING/CONNICK BALANCING TEST, THE NEW JERSEY SUPREME COURT'S INTEREST IN THE MAINTENANCE OF AN IMPARTIAL JUDICIARY ODES NOT OUTWEIGH THE PROBATION OFFICERS' INTERESTS IN BEING MEMBERS OF THE FOP

The First Amendment to the United States Constitution guarantees the right of one citizen to associate with other citizens for any lawful purpose free from government interference. Griswold v. Connecticut, 381 U.S. 479, 483, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). The First

Amendment also provides, in part: "Congress shall make no law ... abridging the freedom of speech ..." The Fourteenth Amendment extended the scope of the first amendment to protect a citizen's freedom of speech from invasion by the individual states. See Edwards v. South Carolina, 372 U.S. 229, 235, 83 S.Ct. 680, 83, 9 L.Ed.2d 697 (1963). The Government may not require an individual to relinquish rights guaranteed by the First Amendment as a condition of public employment. Robinson v. Reed, 566 F.2d 911 (5th Cir. 1978). Union membership is protected by the right of association under the First and Fourteenth Amendments. American Federal of State, County, & Mun. Emp. v. Woodward, 406 F.2d 137 (3d Cir. 1967). In Woodward, supra, the issue raised on appeal was whether public employees, discharged because they had joined a labor union, had a right of action under Section 1 of the Civil Rights Act of 1871, 42 U.S.C. Section 1983 against the public official who discharged them. In Woodward, supra, the defendant

argued that the plaintiffs had no federally protected right to be continued in public employment. The Woodward Court noted that the United States Supreme Court had disposed of this argument in Wieman v. Updegraff, 344 U.S. 183, 191-192, 73 S.Ct. 215, 219 97 L.Ed. 215 (1952), where the Court stated:

> " * * * [T]he facile generalization that there is no constitutionally protected right to public employment is to obscure the issue. For, in United Public Workers, though we held that the Federal Government through the Hatch Act [18 U.S.C.A. Sections 118j, 118l] could properly bar its employees from certain political activity thought inimical to the interests of the Civil Service, we cast this holding into perspective by emphasizing that Congress could not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' [citations omitted]. We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion * * * is patently arbitrary or discriminatory." Woodward, supra, at 140.

This principle has been repeated by the Supreme Court on a number of occasions. In Beilan v. Board of Public Ed. of Phila., 357 U.S. 399, 405, 78 S.Ct. 1317, 1321, s L.Ed.2d 1414 (1958), the Court stated that "By engaging in teaching in the public schools, petitioner did not give up his right to freedom of belief, speech or association. * * *" See Keyishian v. Board of Regents of University of State of New York, 385 U.S. 589, 605, 87 S.Ct., 675, 685, 17 L.Ed.2d 629 (1967); Mescall v. Rochford, 655 F.2d 111 (7th Cir. 1981) (a rule of the Chicago Police Department which prohibited the joining or retaining membership in, or soliciting other members to join, any labor organization which was not exclusively limited to full-time law enforcement officers constituted an unconstitutional limitation on the policemen's First Amendment right to freedom of speech and assembly). Petitioners note at this time that the language in the Chicago Police Department Rule is similar to the language in N.J.S.A. 34:13A-5.3. The Court in Mescall concluded that Rule 54A

was unconstitutional. Id., at 113.

In the case sub judice, the respondents have conceded that they had acted in a quasi-legislative fashion in promulgating the regulation in question. As stated in the opinion "Our determination is quasi-legislative, based on the policy consideration noted below ..." (45A). The New Jersey State Supreme Court has acted as a legislative branch of state government, and has unquestionably restricted the First Amendment rights of petitioners to speak freely, advocate ideas, associate with others, and otherwise proceed on behalf of their members. The Court acknowledged that "Associational rights are precious and should not be restricted without reason ..." (68A).

In this case, as in the case of Hughes v. Lipscher, 740 F.Supp. 454 (D.N.J. 1989), there is no sufficiently important state interest justifying the abridgement of the associational interests of New Jersey's probation officers. The Court's violation of petitioners' First Amendment rights cannot

withstand the strict scrutiny normally given to such regulations. As held in Mescall, the reasons for the respondents' decision are not sufficient to outweigh the first amendment rights of the petitioners to be free from arbitrary and overbroad restraints.

Petitioners submit that since the FOP interprets their own Constitution or by-laws to permit membership by probation officers, then that determination cannot and should not be second guessed by the State Supreme Court, acting in a legislative capacity. All private organizations and clubs have the right to define their own membership without state interference, and the only remaining question becomes whether their membership violates existing and constitutionally sound rules of conduct. The recently adopted canons of conduct of judicial employees do not prohibit probation officers from affiliating with the FOP. See, Fraternal Order or Police New Jersey State By-Laws, Article I, Section 2. The State Supreme Court, in its opinion,

acknowledges that "That State FOP's Constitution has a statement that it is not a 'labor union.'" (70A).

Respondents and the district court rely upon the cases of Connick v. Meyers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708, (1983) and Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), and argue that, under Pickering, the United States Supreme Court has not applied a "strict scrutiny" test to restrictions on speech and associations of public employees. The Pickering and Connick cases are addressed in the recent United States Supreme Court decision in United States v. National Treasury Employees Union, _ U.S. _, 115 S.Ct. 1003 (1995).

In Treasury Employees, the Supreme Court addressed a federal statute (Section 501(b) of the Ethics in Government Act of 1978) prohibiting federal governmental employees from receiving compensation for appearances, speeches or articles. The Court held that the honoraria ban imposes the kind of burden that abridges speech under the First

Amendment. 115 S.Ct. at 1015. The Court held that where the Government employees seek to exercise their right as citizens to comment on matters of public interest, and are not attempting simply to speak as employees upon personal matters, the Government must be able to satisfy a balancing test of the type set forth in Pickering, supra, in order to maintain a statutory restriction on the employees' speech. The Court noted that since the statute in question constitutes a wholesale deterrent to a broad category of expression by a massive number of potential speakers, the Government's burden is even greater than it was in Pickering and its progeny (which usually involved individual disciplinary actions taken in response to particular government employees' actual speech). Specifically, the Government must show that the interest of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by the expression's "necessary impact on the actual operation" of the

Government. 115 S.Ct. at 1014.

The Court in Treasury Employees concluded that although the statute neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their messages, its prohibition on compensation unquestionably imposes a significant burden on respondents' expressive activity by inducing them to curtail their expression if they wish to continue their employment. Moreover, the ban imposes a far more significant burden on them than on the relatively small group of lawmakers whose past recipient of honoraria assertedly motivated its enactment. The large-scale disincentive to expression also imposes a significant burden on the public's right to read and hear what Government employees would otherwise have written and said. Id. at 114-15. The Court in Treasury Employees concluded that the federal employees expressive activities fell within the protected category of citizen comment on matters of public concern rather than employee comment on matters

related to personal status in the workplace. 115 S.Ct. at 1013. The Court concluded that the Government's burden was greater with respect to this restriction on expression (which chills potential speech before it happens) than with respect to an isolated disciplinary action. Id. at 1014.

Petitioners submit that this is similar to the prohibition imposed by the New Jersey State Supreme Court in the case at bar before any affiliation even occurred.

The Treasury Employees Court found that the Government "must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by the expression's 'necessary impact on the actual operation' of the Government." Pickering, 15 S.Ct. at 1014. The Government in Treasury Employees argued that the ban on honoraria was necessary since "a wholesale prophylactic rule is easier to enforce than one the requires individual nexus determinations." Id. at 1017.

Petitioners point out that this is a similar position as that taken by the New Jersey Supreme Court, which has utilized a prophylactic prohibition against probation officers becoming members of affiliating with a law enforcement organization because the Court does not believe that the AOC is capable of monitoring the individual probation officers' activities. The Court in Treasury Employees specifically rejected such a blanket ban. As the Treasury employees Court stated: "A blanket burden on the speech of nearly 1.7 million federal employees requires a much stronger justification than the Government's dubious claim of administrative convenience." id. Special Master Huot, based on the evidence adduced before him, found that "membership in the Fraternal Order of the Police or Policeman's Benevolent Association will not affect the functions of probation." (78A). Moreover, Judge Huot found that "membership in the FOP or PBA will not affect the view of the probationer toward the probation officer." (80A). Since

Judge Huot found that the function of probation would not be affected, and since the view of a probationer toward a probation officer would not be affected by petitioners' affiliation with the FOP, Judge Huot found that there should not be a generalized prohibition against probation officers becoming members or affiliating with organizations such as the FOP. (81A).

In fact, the New Jersey Supreme Court admitted that its prohibition is not based upon any hard evidence, but upon an unsupported belief. The Supreme Court based its decision on nothing more than beliefs, predictions, and conjecture.

As stated above, the United States Supreme Court in the Treasury Employees case specifically ruled that the recited harms sought to be curtailed by the government must be "real, not merely conjectural, and that regulation will in fact alleviate harms in a direct and material way." 115 S.Ct. at 1017.

It is respectfully submitted that this Court should

adhere to the decision in Treasury Employees and reverse the Third Circuit's decision and the decision of the District Court granting of the respondents' motion to dismiss as to Count 1 of the Kirchgessner complaint. Additionally, under the reasoning of Treasury Employees, the preliminary junction should have been granted.

CONCLUSION

Petitioners Robert A. Kirchgessner, Jr., et al. respectfully submit that based upon the foregoing reasons, the petition for certiorari should be granted. The Third Circuit Court of Appeals has interpreted a federal question in a way that conflicts with the decision of this Court in United States v. National Treasury Employees Union, _ U.S. _, 115 S.Ct. 1003 (1995). The appeal also involves a question of exceptional importance, to-wit, the rights of the FOP (and other similar groups) to associate and to free speech.

Respectfully submitted,

_____

ANTHONY J. FUSCO, JR.

Dated: October 17, 1996